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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 498

IN THE MATTER OF CRIMINAL CONTEMPT OF THOMAS C. McCONNELL, PETITIONER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the majority of the court of appeals (5 R. 58–69) [1] and the opinion of Circuit Judge Duffy, dissenting in part (5 R. 69–70), are reported at 294 F. 2d 310.

JURISDICTION

The judgment of the court of appeals was entered on July 6, 1961 (5 R. 70–71). A petition for rehear-

[1] The first four volumes of the five-volume record (referred to herein by "R." preceded by the volume number) consist of the record of the civil proceeding (*Parmelee Transportation Company* v. *John L. Keeshin, et al.*; see the Statement, *infra*, pp. 4, 7–9) out of which the criminal contempt matter here involved arose. The fifth volume contains the proceedings peculiar to the contempt matter. The pagination of volumes 1–4 is continuous from p. 1 to p. 1765; that of volume 5 starts anew with p. 1.

ing was denied on October 5, 1961 (5 R. 71). The petition for a writ of certiorari was filed on October 14, 1961, and was granted on December 11, 1961 (5 R. 72; 368 U.S. 936). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the threat of an attorney during a trial, in open court and in the presence of the jury, to continue a course of conduct, from which he and his co-counsel had been categorically ordered to desist, "unless some bailiff stops us," was contemptuous, whether or not the order was legally correct.

2. Whether the attorney's conduct in making the threat, for which the court found it necessary to interrupt the trial in order to administer a reprimand, obstructed the administration of justice within the meaning of 18 U.S.C. 401(1).

3. Whether the court had the power, following the conclusion of the trial in which the threat was made, to adjudicate the attorney in contempt summarily under Rule 42(a), F.R. Crim. P., or whether the matter was required to be heard by a different judge, pursuant to the notice and hearing provisions of Rule 42(b).

STATUTE AND RULES INVOLVED

Section 401 of Title 18 of the United States Code provides in pertinent part:

> § 401. *Power of court.*
>
> A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—

(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;

* * * * *

(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

Rule 42 of the Federal Rules of Criminal Procedure provides:

Rule 42. Criminal Contempt

(a) *Summary Disposition.*

A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record.

(b) *Disposition Upon Notice and Hearing.*

A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. He is entitled to admission to bail as provided in these rules. If the

> contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment.

Rule 43(c) of the Federal Rules of Civil Procedure provides in pertinent part:

> Rule 43.—Evidence
>
> * * * * *
>
> (c) *Record of excluded evidence.*
>
> In an action tried by a jury, if an objection to a question propounded to a witness is sustained by the court, the examining attorney may make a specific offer of what he expects to prove by the answer of the witness. The court may require the offer to be made out of the hearing of the jury. The court may add such other or further statement as clearly shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. * * *

STATEMENT

On June 30, 1960, petitioner, pursuant to 18 U.S.C. 401 and Rule 42(a), F. R. Crim. P., was summarily adjudicated guilty of three specifications of criminal contempt (Specifications 5, 6, and 7), certified to have been committed by him as one of the attorneys for the plaintiff during the trial of a civil action in the United States District Court for the Northern District of Illinois (*Parmelee Transportation Company* v. *John L. Keeshin, et al.*),[2] and was sentenced to ten

[2] Specifications 1-4 (5 R. 8-9) did not relate to petitioner and are not involved. They pertained to Lee Freeman, co-counsel

days' confinement on each specification, the sentences to run concurrently (5 R. 6–7, 10–11). On appeal, the convictions on Specifications 5 and 7 were reversed (5 R. 59–60, 64–65), and are no longer involved.[3] The conviction on Specification 6 was affirmed (5 R. 60–64), but the sentence was reduced to a fine of $100 (5 R. 64). Circuit Judge Duffy, dissenting in part, thought that the convictions on all three specifications should have been reversed (5 R. 69–70).

Specification 6 reads (5 R. 10–11):

> On April 27, 1960, in the presence and hearing of the jury, after the Court had instructed

for the plaintiff at the *Parmelee* trial. The judgments as to all four were reversed by the court of appeals in *Parmelee Transportation Co.* v. *Keeshin (In the matter of Freeman)*, 292 F. 2d 806 (C.A. 7).

The merits of the civil action are the subject of *Parmelee Transportation Co.* v. *Keeshin*, 292 F. 2d 794 (C.A. 7), certiorari denied, 368 U.S. 944 (No. 431, this Term). See also 186 F. Supp. 533 (district court opinion).

[3] Specification 5 charged petitioner with contempt in saying on the opening day of the trial, prior to the selection of a jury, "This should be a forum where we could have that lawsuit tried without being hemmed in and penned in with a lot of artificial restrictions, dreamed up by counsel on the other side, whereby we are not given an opportunity to tell this jury what this lawsuit is about" (5 R. 10; see 1 R. 112, 132). The court of appeals, for reasons set forth in its opinion, held that this specification did "not validly charge [petitioner] with contempt of court" (5 R. 59–60).

Specification 7 charged that "Repeatedly during the course of the trial * * * [petitioner] conducted himself in a contumacious manner by employing a tone of voice and an attitude indicating contempt and defiance of the Court and disregarding admonitions of the Court with respect to his conduct before the jury" (5 R. 11). The court of appeals held that this specification did not constitute contempt as a matter of law because it recited "mere conclusions and no facts" (5 R. 64–65).

the attorneys for plaintiff to refrain from repeatedly asking questions on subjects which the Court had ruled was [*sic*] not admissible, in the presence of the jury as distinguished from an offer of proof outside the presence of the jury (Trans. 578, 580), the following occurred:

"By Mr. McConnell: Now you are trying to tell us we can't ask these questions. We have a right to ask these questions, and until we are stopped from asking these questions we are going to ask them, because it is in our prerogative in doing it.

"By the Court: I am now stopping you from asking the questions about conversations with Mr. Cross, because I have ruled specifically, definitely and completely that it is not an issue in this case.

"By Mr. McConnell: We have a right to ask them.

"By the Court: You can offer proof on it.

"By Mr. McConnell: We have a right to ask questions which we offer on this issue, and Your Honor can sustain their objection to them. We don't have a right to read the answers, but we have a right to ask the questions, and we propose to do so unless some bailiff stops us." (Trans. 581)[4]

---

[4] It is evident from the court of appeals' treatment of Specification 6 (see 5 R. 60–64) that the court considered that it was upholding the specification in part only. The court appears to have treated the specification as though all the language of petitioner quoted in it had been certified by the trial court as contumacious. Thus, the court of appeals said, "As to specification 6, we hold that, with the exception of one statement attributed to respondent, nothing with which he is charged has been supported by proof of contumaciousness or disrespect" (5 R. 63). It then proceeded to discuss, and to

The circumstances leading to the incident involved in Specification 6, and other facts pertinent to the validity of the conviction thereunder, may be summarized as follows:

1. *The private antitrust suit.*—The civil action out of which the contempt matter arose was a suit for treble damages and injunctive relief under Sections 4 and 16 of the Clayton Act, 15 U.S.C. 15, 26 (1 R. 4–22). The plaintiff, Parmelee Transportation Company, had for many years prior to October 1, 1955, been engaged in the business of transporting passengers and baggage between railroad stations in Chicago as the exclusive agent of the railroads having terminals in that city. The complaint (1 R. 4–22) charged the defendants—John L. Keeshin, Railroad Transfer

---

sustain the judgment as to, "[t]he exception," *viz.*, the final remarks of petitioner in the quoted excerpt: "We don't have a right to read the answers, but we have a right to ask the questions, and we propose to do so unless some bailiff stops us" (5 R. 63–64). The latter language, the court held, constituted "inexcusable contumacious conduct" and was "enough to support" the specification (5 R. 64).

We do not believe, however, that the trial court intended to suggest that all the remarks of petitioner quoted in the specification were contemptuous. We think that the trial judge, like the court of appeals, considered only the final remarks of petitioner contumacious, but that he quoted the immediately preceding colloquy in order to place the remarks deemed contemptuous in their context. This construction is corroborated by the fact that, in a colloquy between petitioner and the court shortly after the incident referred to in Specification 6, the court reprimanded petitioner for using "insult[ing]" language, which it identified by saying, "You certainly do [use insulting language] when you say you will have to be dragged out by a sheriff in stopping you from making the proof" (2 R. 734–735; see *infra*, pp. 17–18)—alluding to petitioner's threat of a few moments earlier to continue asking questions "unless some bailiff

Service Inc.,[5] Hugh W. Cross,[6] six railroads,[7] and the presidents of four of these six railroads[8]—with having conspired, in violation of Sections 1 and 2 of the Sherman Act, 15 U.S.C. 1, 2, to bring about the discontinuance by the railroads of the services of Parmelee and the substitution for Parmelee, under a like arrangement, of Railroad Transfer Service, Inc. The complaint alleged that, before March 1955, Keeshin had promised Cross "valuable consideration" if Cross would persuade the individual railroad presidents to use their influence to cause "Chicago Terminal Lines (the 21 railroads having terminals in Chicago) to eliminate Parmelee from the transfer business in Chicago and to grant the contract instead to a corporation to be formed by Keeshin. This persuasion was to be accomplished by Cross's representing to the railroad presidents that he would exercise his influence on the Interstate Commerce Commission in their favor. During the months that followed, various acts were allegedly performed by the defendants to accomplish

stops us" (2 R. 733). We think, therefore, that the trial court intended to certify as contemptuous only so much of the language of petitioner quoted in Specification 6 as the court of appeals held to be such.

[5] A company organized by Keeshin for the alleged purpose of effectuating the conspiracy charged.

[6] A former member and chairman of the Interstate Commerce Commission.

[7] The Atchison, Topeka and Santa Fe, Baltimore and Ohio, Chicago and North Western, Illinois Central, New York Central, and Pennsylvania Railroads—all of which constituted a committee chosen by 21 railroads ("Chicago Terminal Lines") which comprised all of the railroads having terminals in Chicago.

[8] Howard Simpson (Baltimore and Ohio), Paul Feucht (Chicago and North Western), Wayne Johnston (Illinois Central), and Fred Gurley (Atchison, Topeka and Santa Fe).

this objective, and the plan was brought to fruition in September 1955. At that time, a five-year transfer contract, effective as of October 1, 1955, was granted by Chicago Terminal Lines to Railroad Transfer Service, Inc., allegedly without affording Parmelee an opportunity to compete for the contract and despite the fact that the terms of the new agreement were allegedly less favorable to the railroads than those under which Parmelee had operated and was prepared to offer. (1 R. 5–21, 39–40.) A jury trial was demanded (1 R. 22).

Among the issues joined was whether any public injury had been brought about by the conspiracy charged (1 R. 21, 30, 42, 48, 65, 70, 392). The trial court (Miner, D.J.) ruled before trial that it would "separate" the issues, *i.e.*, that it would limit the issue to be determined by the jury in the first instance to whether any public economic injury had resulted from the railroads' substitution of Railroad Transfer Service, Inc., for Parmelee in the manner alleged in the complaint, and that, only in the event the jury found in the affirmative on that question, would trial be had on the other issues, in particular the issue whether there had been a conspiracy of the kind alleged in the complaint.[2] (1 R. 142; see 1 R. 389–392, 396, 432–436, 439–442, 447–448.) Petitioner and his co-counsel, Lee Freeman, strongly opposed this procedure on behalf of Parmelee; they argued that proof of the conspiracy charged would be sufficient evidence of

[2] The court predicated its ruling on Rule 21 of the Civil Rules of the District Court for the Northern District of Illinois ("Separation of Issues in Civil Suits"), which in turn is based upon Rule 42(b), F.R.C.P. (1 R. 389–390).

public economic injury (1 R. 392–393, 397–415, 443–444, 448). They advised the court that they did not propose to adduce any evidence of public injury except such as would also show the conspiracy, and that if the court proposed to exclude such evidence no purpose would be served in empaneling a jury (1 R. 443–444, 446, 448). They proposed to make an offer of proof of the conspiracy with a view to testing the correctness of their theory of the case in the higher courts (1 R. 443–444, 448). Thus, prior to the empaneling of the jury, the following colloquy occurred (1 R. 443–444):

> By Mr. McConnell: I made an argument before your Honor yesterday in which I stated that I thought any separate proof or any separate trial of an issue of economics or difference of service between Parmelee and the Keeshin company was an irrelevant issue in this case.
>
> I wasn't just making a captious argument. I was making an argument in which I believed, and on which I was prepared to stand.
>
> Now all I want is the right to make a record here. I don't want to waste the time of jurymen or lawyers or your Honor.
>
> By the Court: Make all the record you want.
>
> By Mr. McConnell: Now here is what we propose if it is acceptable to your Honor.
>
> Any offer of proof that we make, we would have to make outside the presence of the jury anyway. I have no intention of offering any proof other than the conspiracy proof under our complaint.

I am not proposing to offer any proof of the differences in services or the economic injury to the public * * * .

* * * * *

* * * Because yesterday you said that you were not going to entertain proof of conspiracy or monopoly.

* * * * *

Now that being so, I just don't want to waste time picking a jury here when I am not going to present any evidence before it.

I would like to make an offer of proof, which I have to make outside the presence of the jury anyway * * * .

* * * * *

* * * So the question is, do we need to technically impanel a jury here? I will follow your Honor's wishes.

By the Court: I will follow the law on the offer of proof out of the presence of the jury.

By Mr. Freeman: Then should we just take the first twelve men and impanel them, under the understanding that we will excuse the jury and make an offer of proof?

By the Court: Yes, you may do that.

By Mr. McConnell: I suppose you would have to then direct the jury on that issue.

By the Court: I don't see any objection to it.

The procedure suggested by petitioner and Freeman was not acceptable to the defense, however, and defense counsel requested that the case "proceed to trial in the normal course" (1 R. 444–450; 2 R. 451–452). The court accordingly ordered that a jury be em-

paneled and that trial proceed in regular course (2 R. 452 *ff.*).

2. *The trial.*—A jury was accordingly empaneled and sworn (2 R. 453–502) and opening statements made (2 R. 503–545), after which the following occurred (2 R. 545–546):

> By THE COURT: I am anticipating an offer of proof. Am I correct in my anticipation?
>
> * * * * *
>
> By MR. MCCONNELL: I don't know how to do it, your Honor, except to start with it in front of the jury and then your Honor rules, and then we take the jury away and go on from there.
>
> By THE COURT: I have no objection in doing it any way you want. You mean you will start an offer of proof?
>
> By MR. MCCONNELL: Yes. The Rule [43(c), F.R. Civ. P., *supra*, p. 42] says I have to put the witness on the stand, have him sworn in the presence of the jury and then start examining him.
>
> By THE COURT: All right; bring out the jury and put your witness on the stand.

The plaintiff proceeded to present its case through two principal kinds of evidence—testimony by witnesses in court and depositions taken in pre-trial discovery proceedings (2 R. 546 *ff.*, 612 *ff.*, 637 *ff.*, 640 *ff.*, 655 *ff.*, 667 *ff.*, 690 *ff.*). Virtually all the proffered proof (apart from merely preliminary testimony) related to the conspiracy charge. The court, adhering to its ruling rejecting the plaintiff's contention that evidence on the conspiracy issue was relevant to the issue of public economic injury (see, *e.g.*, 2 R.

583–584, 586, 588), sustained all defense objections to questions relating to the alleged conspiracy (see, *e.g.*, 2 R. 577, 613–614, 619–621, 624, 637–640, 641, 700, 709–710, 711–712, 714, 719–722, 725–729). The court, on the other hand, was equally insistent with defense counsel that the plaintiff be given complete freedom to make offers of proof on the conspiracy issue for consideration by the court of appeals, should the latter court disagree with the trial court's ruling excluding evidence on that subject (*e.g.*, 2 R. 586–589).

The pattern of procedure which developed was therefore as follows: Whenever a question pertinent to the alleged conspiracy was asked of a witness (or a question in a deposition which bore on that issue was read), an objection would be made, the objection would be sustained, and counsel for the plaintiff would proceed to the next question, the understanding being that offers of proof would be made later in the trial, out of the presence of the jury, as to what the witnesses would have answered (or the deponents had answered) in reply to the questions. Many pages of the transcript were taken up with this procedure (see, *e.g.*, 2 R. 613–614, 619–621, 624, 637–640, 641, 700, 703, 709–710, 711–712, 714, 719–722, 725–729). The consequence was that, although the jury was not being permitted to hear evidence on the issue which the court had ruled was immaterial at that stage of the case, *i.e.*, the conspiracy issue, it was hearing page after page of questions on that issue. The defendants' attorneys, on the one hand, took repeated exception to this procedure and urged the court not to permit plaintiff's counsel to pursue it (2 R. 624–625,

639, 721, 726–727, 729), and, on the other hand, they were insistent that counsel for the plaintiff should not be permitted to make offers of proof pertinent to the alleged conspiracy without there being a witness on the stand (or independently of the reading of a deposition), in accordance with the literal terms of Rule 43(c), F.R.Civ.P. (see, *e.g.*, 2 R. 592, 595, 596–597, 598, 600, 601, 604).

The court apparently took the position that, in view of the defense's objections to the plaintiff's making a general offer of proof, it had no alternative but to permit the above-described procedure in order to allow the plaintiff to "make a record." The court therefore refused to prevent plaintiff's counsel from following the practice (see 2 R. 624, 721, 729). But during the reading by petitioner's co-counsel, Mr. Freeman, of the pre-trial deposition of Howard Simpson, president of the Baltimore and Ohio Railroad (and a defendant), there came a point at which the trial court decided to put an end to the tedious asking of individual questions and to overrule defense counsel's objections to a general offer of proof. The court said (2 R. 731):

> It is becoming obvious that the repetition of question after question about the matter on which the Court has ruled is not competent and proper as distinguished from an offer of proof. It ought not to be hammered and repeated before the jury time and time again, and I would appreciate it very much if you would make your offer of proof on it, and all the conversations, if any—

Mr. Freeman, interrupting, said (2 R. 731–732):

Excuse me. I have only this problem, as Mr. McConnell has well stated it. The statute controlling in this regard is Section — Rule 43(b) of the Federal Rules of Civil Procedure [*sic*[10]]. * * * It requires we do present a witness, and we do go through this deposition or that we do it in person and we ask a question which may be objected to, and it is sustained, and then we offer to prove what the witness would say pursuant to that question.

We are not going through every question and getting an objection. We are trying to shorten it by saying, "Here is a series of questions we will ask," or "Here is a subject matter we will cover."

You will also recall that when we sought to make an offer of proof, for example in the case of Mr. Feucht [11], who later took the stand, Mr. Thompson [a defense attorney] objected as did Mr. Owens and Mr. Meserow and Mr. Keating [other defense attorneys], to the form of the offer. We didn't have a witness there. We were not asking him a question to which there could be an objection. [See 2 R. 596–598, 610–611.]

We find ourselves in an uncomfortable position of both being accused of bad form in making the offer of proof and being accused of bad form when we ask the question. I think we have to try to protect our record by asking the question.

---

[10] It is evident from the context that Mr. Freeman intended to refer to Rule 43(c), F.R. Civ. P.

[11] Paul Feucht, former president of the Chicago and North Western Railway Company, and a defendant.

The court, in reply, said (2 R. 732):

> I will not object, and I will permit your form of offer of proof in the absence of the jury by overruling their objections to the form. You have had the witness on the stand, or you have these depositions, and you have identified the witness, and you have asked questions about conversations and about issues not before this jury.
>
> The same ruling prevails on all of the same questions, and if you ask him a million times, it will be the same ruling, and it becomes obvious to the jury and to the Court that you are merely repeating something that the Court has ruled on.

The following colloquy between petitioner and the court then occurred, in the course of which petitioner made the statement certified in Specification 6 and held by the court of appeals to be contemptuous (in supplied italics) (2 R. 732–733):

> By Mr. McConnell: Their objection is right. They have made a sound objection to proceeding without the witness or without the deposition, and we have to make a record, and your rulings are going to be reviewed.
>
> By the Court: All right, but the witness has been on the stand and depositions are being read.
>
> By Mr. McConnell: Now you are trying to tell us we can't ask these questions. We have a right to ask these questions, and until we are stopped from asking these questions we are going to ask them, because it is in our prerogative in doing it.

BY THE COURT: I am now stopping you from asking the questions about conversations with Mr. Cross, because I have ruled specifically, definitely and completely that it is not an issue in this case.

BY MR. MCCONNELL: We have a right to ask them.

BY THE COURT: You can offer proof on it.

BY MR. MCCONNELL: We have a right to ask questions which we offer on this issue, and your Honor can sustain their objections to them. *We don't have a right to read the answers, but we have a right to ask the questions, and we propose to do so unless some bailiff stops us.* [Emphasis added.]

BY THE COURT: Well, I will stop you now, and I don't appreciate threats. That is the law and my judgment, and I can only rule upon it as I see it, and I forbid you from asking, repeating the same questions over and over again upon which I have ruled specifically a hundred times that it is not admissible and is improper under this issue.

Following some brief further colloquy between the court and Mr. Freeman (2 R. 733–734), the court, at Mr. Freeman's request, declared a ten-minute recess (2 R. 734). After the jury had departed, the following occurred (2 R. 734–735):

BY THE COURT: Mr. McConnell, we are not playing to the galleries here. I am ruling upon rules of evidence as I see them, and these are not evidence.

MR. MCCONNELL: I am not playing to any galleries.

BY THE COURT: I am not going to have any more of it.

BY MR. MCCONNELL: I am trying to try a lawsuit. I am being prevented from trying it at every stage of it.

BY THE COURT: It doesn't call for insults or abuse.

BY MR. MCCONNELL: I am not making any insults.

BY THE COURT: You certainly do when you say you will have to be dragged out by a sheriff in stopping you from making the proof. I will stop it.

BY MR. MCCONNELL: There comes a time when a lawyer has to stand up and state his client's case.

BY THE COURT: And as a gentleman in the bounds of the law.

BY MR. MCCONNELL: We have a right to ask these questions.

BY THE COURT: You have a right to your say, but I have ruled against it, and you may make your record.

BY MR. MCCONNELL: We can't make the record without asking the questions. That is the point.

BY THE COURT: What do you want to say, Mr. Freeman?

BY MR. FREEMAN: I have nothing further to say.

BY THE COURT: All right, a ten-minute recess.

Following the recess, Mr. Freeman said to the court (2 R. 736):

In view of your Honor's ruling, I will not continue the reading of the deposition of Mr. Simpson, but I will seek to cover it in an offer of proof outside the presence of the jury.

The trial then proceeded without further relevant incident.

The incident involved in Specification 6 occurred on April 27, 1960, the third day of the trial following the empaneling of the jury (2 R. 717). On April 29 (3 R. 940), the court made the following statement in the course of a colloquy (3 R. 958):

> I have had insults. I have had abuse. I am going to deal with it when the proper time comes. * * *

3. *The citation for contempt.*—The trial of the civil action ended on May 10, 1960. On that date, immediately following the jury's verdict,[12] the court said (4 R. 1717):

> I am now going to hold Mr. McConnell and Mr. Freeman in contempt of court, and I will make it returnable two weeks from today—direct contempt.

Upon petitioner's advising the court that he had transportation for Europe the following week (4 R. 1717), the following occurred (4 R 1718):

> By The Court: I will wait until you come back. I am not going to interfere. It is not that urgent, but you cannot do what you did in this case, neither of you. You made direct attacks on the Court unwarrantedly, and the record shows it.
>
> By Mr. Freeman: The record doesn't show that.

[12] The jury answered "No" to the interrogatory, "Has the selection of Railroad Transfer Service, Inc., rather than Parmelee Transportation Company to perform the interstation transfer service for the railroads terminating in Chicago resulted in injury to the public?" (4 R. 1717).

BY MR. MCCONNELL: I would ask that it go over until I get back.

BY THE COURT: Yes; I am going to let it go over, and I am going to put it over to the same time I sign the Decree I have asked for [*i.e.*, in the principal case]. There is no emergency about it, but I am going to make the record.

* * * * *

BY MR. MESEROW [a defense attorney]: Is your Honor setting a date for the signing of the Decree?

BY THE COURT: When do you come back?

BY MR. MCCONNELL: The 28th of June.

BY THE COURT: All right; make it on the 30th of June.

BY MR. MCCONNELL: Yes, your Honor.

BY THE COURT: That will be the order.

On the same day, a formal order was accordingly entered holding petitioner and Freeman in direct contempt of court and postponing the imposition of sentence until June 30, 1960 (4 R. 1726; see 4 R. 1727).

4. *The judgment and sentence for contempt.*—On June 30, 1960, the court, as previously noted, issued a "Contempt Order and Certificate" (5 R. 6–11) summarily adjudicating petitioner and Freeman guilty of seven specifications of criminal contempt (three as to petitioner and four as to Freeman). In conformity with Rule 42(a), F.R. Crim. P. (*supra*, p. 3), the order certified that the contempts specified had been committed in the actual presence of, and had been seen and heard by, the court during the trial of the treble damages action (5 R. 6–7). In a pre-

fatory passage preceding the specifications, the order further stated (5 R. 7):

> It is obvious from the record and transcript in this cause, and more especially cited herein, that the defendants Lee A. Freeman and Thomas C. McConnell, both attorneys for the plaintiff herein, embarked upon a course of unprofessional, unethical, intimidating, insulting, defiant, unfair and improper behavior, to foist their will upon the Court and jury and to dominate the course of procedure herein without regard to an honest and impartial administration of justice. [13]
>
> I find that the acts, statements, and conduct of each of the defendants hereinafter specified constituted contumacious conduct of so grave a character as to make imposition of fines insufficient punishment.

On the occasion of the signing of the certificate, the following colloquy occurred in open court (4 R. 1721–1723):

> By The Court: * * *
>
> On the question of contempt, I have prepared an order which I am now signing. I will give you each copies.
>
> I am sentencing each of the defendants to ten days in the County Jail, with this proviso: I

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[13] The court of appeals held that this part of the certificate was "unimportant" because it was not included in a specification (5 R. 68): "Inasmuch as the court's order must stand or fall on the specifications, the language in the preface is unimportant, unless it supports [petitioner's] contention that it showed the prejudice of the trial judge and that he was 'incapable of giving him any kind of a fair hearing on the issue of contempt'. We cannot give it such [illegible]."

have no ill feeling in the matter. The court was seriously hurt in this matter on the procedure. The specifications are in here, and I will read them if you want me to.

I will enter my own motion for suspension of it, if you folks will decide to enter or file a petition of retraction and apology.

I have no malice in my heart. I cannot permit this to go unchallenged with all the seriousness at my command. I don't want the punishment to be unduly, but the court is entitled to that much consideration, and you must determine between now—I will give you plenty of time. I will continue it until court's reopening, unless you have other plans. I have no objection to between now and September, say the 15th or latter part of September, you can decide if you want to.

By Mr. Thomas C. McConnell: That is perfectly all right.

By The Court: If you want to file the petition or take an appeal.

By Mr. McConnell: So there is no final order entered this morning?

* * * * *

By Mr. McConnell: I say my only question about it is whether it is a final order entered today.

By The Court: I am entering a final order today with a motion to vacate. It is the court's order. If you want to make your own motion, I will be glad to entertain that, but I am doing that and I am giving you a lot of consideration.

I don't want to—the court has got to protect itself against the charges, the specifications that I have in there. * * * All in all, I would rather

have the apology than I would the sentence, much rather.

5. *The motion to vacate the judgment of contempt.*—On July 7, 1960, petitioner filed a motion to arrest and vacate the judgment of contempt and for "trial before an impartial judge" (5 R. 11–19). He contended that the court had "lost jurisdiction to deal with the alleged contempt summarily since the alleged contempt occurred several months prior to the entry of the contempt order and certificate and on at least two occasions the trial judge stated that there was no emergency about the contempt matter" (5 R. 11) and that he "was entitled to have the issues asserted by said judge as contempt of court tried before an impartial judge pursuant to Rule 42(b) of the Federal Rules of Criminal Procedure [*supra*, pp. 3–4]" (5 R. 12). He denied the assertion in the certificate that he had been guilty of "unethical and unprofessional conduct," and stated that he could not accept "the option of apologizing for something of which [he was] not guilty or of going to jail" (5 R. 18).

On the same day, in open court, petitioner stated to Judge Miner that neither he nor Mr. Freeman had intended to attack the integrity of the court, that any "mistakes" they had made "were not mistakes that were intended for the purpose of attacking your Honor" (5 R. 35–36). The following then occurred (5 R. 36–37):

> THE COURT: I have said to you at the outset that I have no ill-feeling. It was the matter of the integrity of the Court that I wanted to pro-

tect. Believe me, there is nothing personal in it.

MR. THOMAS McCONNELL: There was no attack made on this Court and never has been.

THE COURT: From the words that you have used and the statements that are shown in the record, there isn't any question but that you have exceeded every reasonable limitation in the trial of the case, but I still, certainly, have no malice in my heart, I never did in my life. I have been on the bench twenty-three years and I have never done this before.

There is one thing one must do—protect the record. Over the objections of the defense counsel, I think all the way down the line I have let you make your record completely. There is not a scintilla of evidence, not a statement that will indicate you have been curtailed in any way in the making of your offer of proof. Isn't that right?

MR. THOMAS McCONNELL: Well, we have made our offers of proof.

THE COURT: Completely.

MR. THOMAS McCONNELL: We felt then and we do feel now that in the heat of the trial we had to take certain steps to protect our rights. That's all we are trying to do.

* * * * *

THE COURT: I will enter your motion to vacate.

* * * * *

I would much prefer when you file your petition, that you state a retraction and apology. I will help you in every way I can, believe me. I don't want any hardship upon either of you. It is with great reluctance that I have done

> what I have done. I do not penalize lawyers unduly. I don't want to punish them unnecessarily and harshly. It has never been my practise and it will not be in this case, but I think the most insulting remarks, the most abusive words are on the record and I pointed them out to you.

The matter was then continued to September 15, 1960 (5 R. 38).

On September 15, 1960, petitioner advised the court that he declined to make the "retraction and apology" upon which the court had conditioned its willingness to vacate the contempt judgment, and the motion to vacate was overruled (5 R. 39–40).

6. *The appeal.*[14]—In sustaining the contempt judgment as to Specification 6, the majority of the court of appeals said in part (5 R. 63–64):

> The whole theory for holding respondent immune from his conduct in representing his client in good faith is satisfied when he is permitted to make a record in a respectful manner in the trial court for use in a court of review. The theory rests on the premise that he needs no further protection than an adequate record and that, if the court infringes his right to make such a record, his redress is in the court of review. His language which we now quote [15] indicates that he did not rely alone

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[14] At the request of Judge Miner the United States Attorney appeared in the court of appeals in support of the contempt conviction.

[15] *I.e.*, the words "We don't have a right to read the answers, but we have a right to ask the questions, and we propose to do so unless some bailiff stops us" (see 5 R. 63, and *supra*, pp. 6, 17).

> upon this protection but that he took the position that he intended to physically defy the court to the point that only a superior physical force called upon by the court could prevent him from proceeding. Even if he was right in his method of making a record and the court was wrong, this threat was inexcusable contumacious conduct. While events did not precipitate a physical clash, respondent made it clear when he uttered these words that he proposed to insist upon pursuing his course of action until stopped by a court bailiff. This proof is enough to support specification 6 and to that extent will require an affirmance of the order from which this appeal has been taken. * * *

In holding that Judge Miner was not required to disqualify himself from acting in the contempt matter, the majority, after referring to *Sacher* v. *United States*, 343 U.S. 1, and *Offutt* v. *United States*, 348 U.S. 11, said (5 R. 67):

> In the present appeal, * * * we do not find that [the judge] was personally involved in controversy with the respondent or that in his rulings leading to the orders appealed from he was actuated by personal enmity toward either of the lawyers held in contempt. Accordingly, we do not feel that the *Offutt* case requires that upon the record before us there should be a remandment for retrial before another judge. * * * [T]he records before us affirmatively rebut any personal enmity harbored by the judge against the two respondents before him.
>
> We, therefore, hold that the district court did not err in failing to refer the questions of

> contempt to the executive committee for assignment for hearing by another judge.

Judge Duffy, dissenting in part, agreed with the majority that Judge Miner did not err in failing to request the assignment of another judge to hear the charges of contempt (5 R. 69). He thought, however, that reversal was required as to Specification 6 as well as to Specifications 5 and 7 (5 R. 69–70). On the latter point he said in part (5 R. 70):

> Mr. McConnell has had much trial experience. Even under the stress of the exasperating conditions such as he encountered, he should never have threatened to continue asking the questions in view of the Court's rulings, although he felt certain the rulings were incorrect. After the recess, when he had had time to cool down and consider the language used, he should have apologized to the Court.
>
> Nevertheless, Mr. McConnell did comply with the Court's order. At that point there was no interference with the conduct of the trial. There was no obstruction in the administration of justice. * * *

SUMMARY OF ARGUMENT

I

A. Petitioner's contention that his conduct cannot be deemed contemptuous because the order of Judge Miner which he threatened to disobey was not a "lawful" order is based on a misconception of the meaning of "lawful" as used in 18 U.S.C. 401(3). An order of a court is a "lawful" order within the statutory intendment if the court has the authority to make it, whether it be correct or erroneous.

B. Petitioner's defiance of the authority of the court obstructed the administration of justice within the meaning of the contempt statute. The requirement that an act of misbehavior in the presence of the court, to be punishable as contemptuous, must be obstructive of the administration of justice does not mean that the misconduct must be accompanied by, or result in, some physical interruption of the trial or other proceeding. That insolent, insulting, defiant, or otherwise disrespectful language to a judge in open court constitutes punishable contempt, without further proof of the obstructive consequences of such conduct, has never been questioned. Where a court's authority is thus openly and publicly defied, the offensive language is deemed inherently to obstruct the judicial process, since the utterance tends by its very nature to bring about the demoralization of the court's authority before the public. It is the purpose of the power of summary contempt to prevent consequences of that sort.

Moreover, the record in the present case shows that the remarks of petitioner for which he was cited did interrupt the trial. The duration of the interruption cannot be a relevant circumstance. The dissenting judge's view that there was no obstruction in the administration of justice because petitioner eventually complied with the court's order fails to take account of this interruption, and overlooks the fact that the defiance which petitioner exhibited was in itself obstructive of the processes of justice, in the proper sense of that requirement of the contempt statute.

II

A. Ever since *Sacher* v. *United States*, 343 U.S. 1, it has been settled that a trial judge in whose presence a contempt occurs may, without extinguishing his power under Rule 42(a), defer the summary adjudication of contempt until the completion of the trial if in his judgment the exigencies of the trial require that he do so. An attorney who is adjudicated in contempt in the midst of a trial, even though sentence be suspended, is unlikely to be able to give his client's cause the undivided attention which the client has a right to expect—particularly where, as will often happen, the attorney chooses to appeal from the contempt order and starts promptly to plan his strategy for procuring its reversal. Deferral of summary action until after the conclusion of the trial has the further advantage, as noted in *Sacher* (343 U.S. at 11), of guarding against the possibility that "what should be a well-considered judgment" will be pronounced by the judge "while smarting under the irritation of the contemptuous act."

The procedure approved in *Sacher* was essentially followed in the present case. The court's further postponement of the specifications of contempt and of the sentencing to a time six weeks following the termination of the trial, in order to accommodate petitioner by allowing him to take a pre-arranged trip to Europe, should not now be used as a reason for denying to the court power it would otherwise have had to act summarily under Rule 42(a).

B. The fact that the acts of contempt for which petitioner was cited involved disrespect for the court did not disqualify the presiding judge from acting

summarily; the contempts involved in *Sacher* also involved disrespect for the court. Nor did *Offutt* v. *United States*, 348 U.S. 11, modify the rule of the *Sacher* case. *Offutt* held only that, where the judge has become so personally embroiled with the individual whose conduct is in question that he cannot bring the requisite judicial detachment to the task of vindicating the court's authority, he should request that another judge be assigned to hear the matter. The present case involved no such personal embroilment of Judge Miner with petitioner, and is therefore wholly unlike *Offutt* in this regard. Judge Miner bore himself throughout the trial with exemplary dignity and forbearance. The fact that Judge Miner offered to permit petitioner to purge himself by making an apology and retraction merely emphasizes the complete lack of vindictiveness with which he undertook to uphold the authority of the court.

If the fact that the language charged as contemptuous involved disrespect for the court sufficed without more to disqualify the court from dealing with the matter summarily, one of the principal purposes of the power of summary contempt would be defeated. The proper maintenance of the dignity and authority of the court requires in all ordinary cases that the same judge against whom the disrespect is directed pronounce the judgment of contempt and impose the penalty. Respect for the authority of the court would not be enhanced if the general rule were that manifestations of disrespect could be punished only by the presiding judge's assuming the role of complaining witness before another judge in a proceeding

under Rule 42(b). Many judges, rather than resort to any such procedure, would doubtless, in all but the most aggravated cases, let the matter pass without initiating appropriate vindicatory action—to the detriment of the orderly conduct of trials and the judicial process. The alternative to such a procedure is that sanctioned in the *Sacher* case and followed here.

ARGUMENT

I

PETITIONER'S THREAT TO CONTINUE A COURSE OF ACTION, FROM WHICH HE AND HIS CO-COUNSEL HAD BEEN CATEGORICALLY ORDERED TO DESIST, "UNLESS SOME BAILIFF STOPS US," WAS CONTEMPTUOUS

A. WHETHER THE ORDER WHICH PETITIONER DEFIED WAS RIGHT OR WRONG IS IMMATERIAL

Immediately preceding the statement by petitioner which was upheld as contemptuous by the court of appeals, the trial court said to petitioner (2 R. 733; see the Statement, *supra*, pp. 6, 17):

> I am now stopping you from asking the questions about conversations with Mr. Cross, because I have ruled specifically, definitely and completely that it is not an issue in this case.

In the face of this categorical command, there was but one course open to petitioner—compliance. Petitioner's rejoinder that he and his co-counsel had "a right to ask the questions, and we propose to do so unless some bailiff stops us" (*ibid.*) was in defiance of the authority of the court, disruptive of orderly procedure, and contemptuous as a matter of law. As

stated by the majority below (5 R. 64), petitioner, by this language—

> took the position that he intended to physically defy the court to the point that only a superior physical force called upon by the court could prevent him from proceeding. Even if he was right in his method of making a record and the court was wrong, this threat was inexcusable contumacious conduct.[16]

1. Petitioner's contention (Br. 21–30) that his conduct cannot be deemed contemptuous because the order of Judge Miner which he threatened to disobey was not a "lawful" order is founded on a misconception of the meaning of "lawful" as used in 18 U.S.C. 401(3) (*supra*, pp. 2–3). Petitioner argues that under Rule 43(c), F.R. Civ. P. (*supra*, p. 4), the only "lawful" way in which he and his co-counsel could make their offers of proof on behalf of their client was first to lay a foundation by asking questions of witnesses relating to the alleged conspiracy in the presence of the jury (or reading questions on that subject which had been put to deponents in the pre-trial discovery proceedings). When Judge Miner, overruling the objections of all parties, decided to put a stop to this procedure and to require plaintiff's

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[16] The court of appeals was unanimous that petitioner's language was offensive. Judge Duffy agreed with the majority (5 R. 70; see the Statement, *supra*, p. 27) that petitioner "should never have threatened to continue asking the questions in view of the Court's rulings," and was of the view that, having done so, he owed an apology to the trial judge. We discuss *infra*, pp. 40–41, Judge Duffy's position that, notwithstanding petitioner's contumacy, no contempt was committed because he ultimately "did comply with the Court's order."

counsel to make their offers of proof without any further reading of questions from the Simpson deposition on the subject of conspiracy, he acted "unlawfully," petitioner argues—with the consequence that there was no obligation on the part of petitioner and Mr. Freeman to comply with his command, and therefore no contempt on petitioner's part when he told the court he proposed to ignore the command unless physically restrained by a bailiff (Br. 25).[17]

Although petitioner's construction of Rule 43(c) as applied to offers of proof of the type here involved is questionable,[18] there is no need to pursue the merits of that issue for present purposes. Whatever may be the proper mode of making an offer of proof under the peculiar circumstances of the trial out of which the present case arose, the fact is that the trial court, after extensive discussion of the problem in colloquies

[17] There can be no dispute that petitioner "was entitled to proceed at least far enough for the record to show he was unequivocally stopped by the court" (Br. 21). But petitioner was "unequivocally stopped" before his contemptuous statement (2 R. 733; see the Statement, *supra*, pp. 16-17). For this reason his characterization of the language held contemptuous as merely "picturesque language" used to obtain "record evidence" of such an unequivocal direction (Br. 21) does not comport with the record. All three judges below recognized that petitioner went beyond getting "record evidence" of a clear command from the court and that he in fact defied the court by threatening to ignore its order unless prevented by force (5 R. 63–64, 70; see the Statement, *supra*, pp. 25–26, 27).

[18] We suggest that Rule 43(c) was designed to apply to the ordinary "offer of proof" with respect to which an occasional question propounded to a witness is held by the trial court to be beyond the scope of the issues; it was not meant to apply to an extraordinary situation, such as that involved here, where the entire proof offered by a party relates to a subject which has been ruled to be irrelevant.

with counsel, finally resolved the issue and unequivocally commanded plaintiff's counsel to discontinue the course of procedure they had been pursuing. At that point, it became the duty of counsel to comply with the court's directive, whether in their view it was right or wrong. "Lawful," as used in 18 U.S.C. 401(3), manifestly does not mean "correct," or "free from error," as petitioner would have it. An order of a court is a "lawful" order within the statutory intendment if the court has the authority and jurisdiction to make it. If the order be erroneous, it would be subject to correction on appeal, but, while it is outstanding, disobedience would be punishable as contempt.[19]

2. There is no substance to petitioner's present suggestion that "his client's right to make a record on appeal was destroyed" by the trial court's order (Br. 29). Petitioner himself initially suggested that the empaneling of a jury be omitted and that the plaintiff's offers of proof be made in general terms, without jury or witnesses (see the Statement, *supra*, pp. 10–11). Basically, what the trial court finally ordered as a solution to the problem with which it was confronted was a modification of petitioner's original proposal. Even petitioner acknowledged during the contempt proceedings that his client's right to make offers of proof had been fully preserved at the trial (5 R. 36; see the Statement, *supra*, p. 24; see also

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[19] See *United States* v. *United Mine Workers*, 330 U.S. 258, 293–294; *Gompers* v. *Bucks Stove & Range Co.*, 221 U.S. 418, 450; *Worden* v. *Searls*, 121 U.S. 14; cf. *Howat* v. *Kansas*, 258 U.S. 181, 189–190. See also *United States* v. *Shipp*, 203 U.S. 563, 573.

3 R. 1035).[20] Moreover, even if the client's right to make a record had been frustrated, "his redress," as observed by the court of appeals, "[was] in the court of review" (5 R. 63).

B. PETITIONER'S DEFIANCE OF THE AUTHORITY OF THE COURT OBSTRUCTED THE ADMINISTRATION OF JUSTICE WITHIN THE MEANING OF THE CONTEMPT STATUTE

Section 401(1) of Title 18 (*supra*, pp. 2–3) defines the misbehavior which constitutes punishable contempt as "[m]isbehavior of any person in its [the court's] presence or so near thereto as to obstruct the administration of justice." Petitioner contends (Br. 30–32) that the misconduct certified in Specification 6 did not meet this description because it did not obstruct the administration of justice. There is no merit to the argument.[21]

1. The requirement that an act of misbehavior in the presence of the court, to be punishable as contemptuous, must obstruct the administration of justice does not mean, as petitioner and the dissenting judge be-

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[20] Petitioner's assertion (Br. 29–30) that omissions in his offers of proof, cited by the trial court and court of appeals as justifying the dismissal of the *Parmelee* suit, "were occasioned by the trial court's refusal to permit petitioner to make proper offers of proof within the rule [*i.e.*, Rule 43(c), F.R. Civ. P.]" is without record support. Petitioner was given complete freedom to make any offer of proof he desired.

[21] Notwithstanding the phraseology of the subsection, which would suggest that the obstruction of justice requirement applies only to acts of misconduct committed near the court (as distinguished from such acts committed in the presence of the court), we shall assume, *arguendo*, that the qualification is equally applicable to both types of misbehavior. Cf. *Ex parte Hudgings*, 249 U.S. 378, 383; *In re Michael*, 326 U.S. 224, 228.

low (5 R. 70) apparently assume,[22] that the misbehavior must be accompanied by, or result in, some overt physical interruption of the trial or other proceeding. The kind of contemptuous behavior which has resulted in such a palpable obstruction of the processes of justice—as, for example, a physical assault on the person of the judge or the striking of a court attendant (cf. *Ex parte Terry*, 128 U.S. 289)—has been the exception rather than the rule in the adjudicated cases in this area of the law. More common than such physical ways of demoralizing the authority of the court have been the subtler acts or utterances whereby that authority has been exposed to the danger of scorn or obloquy—the slighting remark, the contemptuous gesture, the defiant rejoinder, the insolent retort. Particularly where, as here, a jury is sitting, able to observe the manner in which the dignity and authority of the court are treated with disdain, it is the less overt manifestations of disrespect, more often than the grosser forms of contumacious conduct, which

[22] Petitioner argues (Br. 32) that the majority below, as well as the dissenting judge, concluded that the conduct certified as contemptuous in Specification 6 failed to obstruct the administration of justice within the meaning of 18 U.S.C. 401(1). The court's opinion cannot be read as supporting such an interpretation. The majority sustained petitioner's conviction on Specification 6 only after it had referred to the requirement that there be an interference with the administration of justice for purposes of punishing misbehavior in the presence of the court as contempt (5 R. 62–63). The majority must have concluded, consequently, that at least the portion of petitioner's remarks, quoted in Specification 6, which it upheld as constituting a contempt (see note 4, *supra*, pp. 6–8) did obstruct the administration of justice. On no other hypothesis can its decision be reconciled with the pertinent passages of its opinion.

present the greater danger that the majesty of the law, identified in the jurors' minds with the person of the presiding judge, will be degraded, and the administration of justice obstructed, in ways which might not be readily apparent. If the jurors perceive that the authority of the judge is held in contempt by the parties or their attorneys, the processes of justice are obstructed in a manner which, if less patent, is no less real than where a trial is brought to an actual temporary halt by obstreperous behavior.

For these reasons, the law has never required that an action or utterance, to be summarily punishable, must be accompanied by some palpable physical obstruction of the pending proceeding. That insolent, insulting, defiant, or otherwise disrespectful language to a judge in open court in the course of a trial constitutes punishable contempt, without further proof of the obstructive consequences of such conduct, has to our knowledge never been questioned.[2] Thus, in *Ex parte Terry*, 128 U.S. 289, 308, the giving of "opprobrious language to the judge" was cited as a typical "contempt in the face of the court" (quoting Bacon's Abridgment, "Courts," E). The same case

[2] See *Offutt* v. *United States*, 348 U.S. 11; *Sacher* v. *United States*, 343 U.S. 1; *Fisher* v. *Pace*, 336 U.S. 155; *Cooke* v. *United States*, 267 U.S. 517, 534; *Ex parte Terry*, 128 U.S. 289, 307-308, 309; *MacInnes* v. *United States*, 191 F. 2d 157, 160 (C.A. 9), certiorari denied, 342 U.S. 955; *In re Crow*, 165 Minn. 293, 296 N.W. 102 (1925); *Ex parte Wright*, 65 Ind. 504, 508 (1879); *Mahaney* v. *State*, 33 Ind. App. 655, 658, 72 N.E. 151, 152-153 (1904); *State* v. *Conn*, 7 N.D. 299, 74 N.W. 992 (1898); *In re Cooper*, 32 Vt. 258, 263-264 (1859); *In re Wills*, 91 Wash. 180, 162 Pac. 38 (1917); *Alberti* v. *Commonwealth*, 315 Mass. 531, 535, 53 N.E. 2d 690, 692 (1944); *White* v. *Gaines*, 195 Ga. 46, 21 S.E. 2d 787 (1943).

referred with approval to a statement from *Ex parte Wright*, 65 Ind. 504, 508, that "direct contempt" includes "an open insult, in the face of the court to the persons of the judges while presiding" (128 U.S. at 309). And in *Cooke* v. *United States*, 267 U.S. 517, 534, this Court noted that, "To preserve order in the court room for the proper conduct of business," the court must have the power to punish as contemptuous any "disturbance or violence or physical obstruction *or disrespect to the court* when occurring in open court" (emphasis added). The evident rationale of this fundamental rule is that, where a court's authority is thus openly and publicly defied or held in contempt, the offensive language is deemed inherently obstructive of the judicial process, since the utterance tends by its very nature to bring about that " 'demoralization of the court's authority' before the public" [24] which it is the purpose of the power of summary contempt to prevent. Cf. *Toledo Newspaper Co.* v. *United States*, 247 U.S. 402, 419.

Nothing in *Ex parte Hudgings*, 249 U.S. 378, or in *In re Michael*, 326 U.S. 224, is inconsistent with these views. In *Hudgings*, this Court said (249 U.S. at 383):

> An obstruction to the performance of judicial duty resulting from an act done in the presence of the court is, then, the characteristic upon which the power to punish for contempt must rest. This being true, it follows that the presence of that element must clearly be shown in

[24] *In re Oliver*, 333 U.S. 257, 275 (quoting *Cooke* v. *United States*, 267 U.S. 517, 536).

> every case where the power to punish for contempt is exerted * * *.

In *In re Michael* this language was referred to with approval (326 U.S. at 228). But those cases hold no more than that perjury, in and of itself, is not contempt. It is in the light of that holding that the above-quoted language of *Ex parte Hudgings* must be understood. There is nothing, we submit, in either case which would support the view that where openly insulting or otherwise contemptuous language is addressed to a court further proof of its obstructiveness is required to make it summarily punishable as contempt.

2. In any event, the record in this case affirmatively shows that the contumacious language did result in a palpable obstruction or interruption of a pending proceeding. Following the defiant remark for which petitioner was later cited, the trial judge found it necessary to interrupt the trial to administer a reprimand to him (2 R. 733). A moment later, petitioner's associate requested a ten-minute recess. Following the dismissal of the jury, the judge administered a more extensive rebuke—in the colloquy in which petitioner was admonished that he was "not playing to the galleries" (2 R. 734–735). (See the Statement, *supra*, pp. 17–18.) "An obstruction to the performance of judicial duty resulting from an act done in the presence of the court" (*Ex parte Hudgings, supra*, 249 U.S. at 383) thus did in fact occur. Were the duration of the interruption or obstruction a relevant circumstance, even an aggravated act of contumacy could not be punished as contemptuous if the of-

fender were promptly removed from the courtroom and the proceedings resumed. In the report of *Ex parte Terry*, 128 U.S. 289, for example, there is nothing which suggests that the assault on the marshal in open court, there held summarily punishable as a contempt, interrupted the proceedings in progress more than momentarily. On the contrary, the report of the case in the lower court indicates that the interruption was in fact of very brief duration.[23] In any event, neither this Court nor the lower court considered the period of time consumed by the obstructive disturbance to be a relevant factor.

Judge Duffy, in his dissenting opinion below, points out that, following the recess which was declared shortly after the remark of petitioner for which he was cited in Specification 6, "Mr. McConnell did comply with the Court's order." Because of the compliance, Judge Duffy concluded that "[*a*]*t that point* that was no interference with the conduct of the trial" (emphasis added), and hence "no obstruction in the administration of justice" (5 R. 70; see the Statement, *supra*, p. 27). But if petitioner's threat to ignore Judge Miner's order was contemptuous when it occurred, as the majority correctly held, it did not cease to be so because co-counsel obtained a recess and petitioner later thought better of the matter and decided not to carry out his stated intent. The fact, in short, that "events did not precipitate a physical

[23] The assault occurred during the reading of an opinion by Mr. Justice Field, and "[a]s soon as the disturbance had ceased, Justice Field proceeded with the reading of the opinion * * *" (*In re Terry*, 36 Fed. 419, 420 (C.C. D. Cal.)).

clash" (5 R. 64) did not change the character of the completed act of contempt. More importantly, Judge Duffy's analysis wholly overlooks the fact that the defiance which petitioner exhibited in making the threat was itself obstructive of the processes of justice in the true sense of the statute (see *supra*, pp. 36–38).

II

JUDGE MINER PROPERLY ACTED SUMMARILY UNDER RULE 42(a) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE

Petitioner contends (Br. 32–37) that Judge Miner erred in summarily adjudicating him in contempt under Rule 42(a), F.R. Crim. P. (*supra*, p. 3), rather than ordering a hearing on the contempt charges under Rule 42(b) (*supra*, pp. 3–4) before a different judge. This contention was rejected by all three judges of the court of appeals (5 R. 65–67, 69) and is without merit.

A. A TRIAL JUDGE MAY DEFER THE SUMMARY ADJUDICATION OF CONTEMPT UNTIL THE COMPLETION OF THE TRIAL

Since *Sacher* v. *United States*, 343 U.S. 1, it has been settled law that a trial judge in whose presence a contempt occurs may, without extinguishing his power under Rule 42(a), defer the summary adjudication of contempt until the completion of the trial if in his judgment the exigencies of the trial require it. Accord, *In re Carey*, 165 Minn. 203, 204–205, 206 N.W. 402 (1925).[28] "The overriding consideration," as this

[28] See *Offutt* v. *United States*, 208 F. 2d 842 (C.A.D.C.), reversed on other grounds, 348 U.S. 11; *In re Murray*, 205 Fed. 626 (C.A. 9); *In re Grossman*, 109 Cal. App. 625, 631–632, 293

Court observed in the *Sacher* case (343 U.S. at 10)—

> is the integrity and efficiency of the trial process, and if the judge deems immediate action inexpedient he should be allowed discretion to follow the procedure taken in this case. To summon a lawyer before the bench and pronounce him guilty of contempt is not unlikely to prejudice his client. * * *

It can make no difference whether the client of the attorney guilty of the offensive conduct is a defendant in a criminal trial, as in the *Sacher* and *Cary* cases, or whether, as here, the client is a party to an important civil action (cf. *In re Maury*, 205 Fed. 626 (C.A. 9)). In either case, the interests of justice require that the client's representation during the trial be as unencumbered by the purely personal concerns of his lawyer as is consistent with the need for prompt penal vindication of the authority of the court. An attorney who is adjudicated in contempt in the midst of a trial, even though sentence be suspended, is unlikely to be able to give his client's cause the undivided attention which the client has a right to expect—particularly where, as will often happen, the attorney chooses to appeal from the contempt order and starts promptly to plan his strategy for winning a reversal in the higher courts.

Deferral of summary action until after the conclusion of the trial has the further advantage, as noted

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Pac. 683, 685-686 (1930). Cf. *Hallinan* v. *United States*, 182 F. 2d 880, 887 (C.A. 9), certiorari denied, 341 U.S. 952; *MacInnes* v. *United States*, 191 F. 2d 157, 160–161 (C.A. 9), certiorari denied, 342 U.S. 953; *Middlebrook* v. *State*, 43 Conn. 257, 269 (1876).

by this Court in *Sacher* (343 U.S. at 11), of guarding against the possibility that "what should be a well-considered judgment" will be pronounced by the judge "while smarting under the irritation of the contemptuous act."[27]

The procedure approved in the *Sacher* and other cases cited *supra*, pp. 41–42, was followed here. At the time of the incident certified in Specification 6, Judge Miner apprised petitioner that he did not "appreciate threats" and that he considerd his conduct "insult[ing]" and "abus[ive]" (2 R. 733, 734–735; see the Statement, *supra*, pp. 17–18). Later in the trial, again indicating his awareness that he had "had insults" and "abuse," he stated that he was "going to deal with it when the proper time comes" (3 R. 958; see the Statement, *supra*, p. 19). At the conclusion of the trial, immediately following the verdict, he notified petitioner

[27] See also Judge Frank's statement to the same effect (*United States* v. *Sacher*, 182 F. 2d 416, 459 (C.A. 2)): "This argument [that the power of summary punishment must be exercised, if at all, immediately upon the occurrence of the contemptuous conduct] puts a premium on hasty action. It means that the judge may act summarily only when he is least likely to be poised and temperate, that only then may he act without a hearing. Why such instant action is fairness or due process—adequately protective of the accused—and postponed action is not, remains unexplained by proponents of this contention. Curiously enough, those who (1) argue that such instant action is an indispensable condition of summary punishment also (2) counsel (and wisely) that the use of the summary power be narrowly circumscribed, for fear that the trial judge, in using it, may do so in haste, spurred to vindictiveness by the anger of the moment. I find it difficult to reconcile those two contentions: The first insists that summary punishment is not valid unless hasty. The second points to the potential danger of haste."

and his co-counsel, Mr. Freeman, that he was "now going to hold [them] * * * in contempt of court, * * * returnable two weeks from today * * *" [for making] direct attacks on the Court unwarrantedly" during the trial (4 R. 1717-1718), and on the same day entered a formal order holding them in contempt (4 R. 1726, 1727). (See the Statement, *supra*, pp. 19-20.) It is true, as petitioner points out, that Judge Miner also said that there was "no emergency about it," following which he "postponed the imposition of sentence for six weeks to June 30, 1960" (Pet. Br. 33; see 4 R. 1718). But what petitioner fails to note, is that the reason for the postponement of further proceedings in the contempt matter for six weeks was to accommodate petitioner by allowing him to take a pre-arranged trip to Europe. Certainly Judge Miner's willingness to adjust his calendar to meet petitioner's convenience should not now be allowed to be used as a reason for denying the judge the power to certify the specifications of contempt and to punish summarily which he would otherwise have had under Rule 42(a). Moreover, although there was "no emergency about" the contempt matter after the trial had been concluded, this fact was no less true of the contempt matters involved in the *Sacher* and other cases cited *supra*, pp. 41-42.*

* The fact that Judge Miner on several occasions during the trial acknowledged that counsel for the plaintiff were acting "in good faith" on behalf of their client (see Pet. Br. 33, 35) is not inconsistent with his summary action adjudicating petitioner in contempt for the defiant language used by petitioner on the occasion certified in Specification 6. The "good faith" of petitioner which the judge referred to was good-faith in arguing that evidence relating to the conspiracy charge of the

B. THE TRIAL JUDGE WAS NOT DISQUALIFIED FROM ACTING SUMMARILY MERELY BECAUSE THE ALLEGED ACTS OF CONTEMPT INVOLVED DISRESPECT FOR THE COURT

1. The fact that the acts of contempt for which petitioner was cited involved disrespect for the court did not, as petitioner argues (Br. 34), disqualify the presiding judge from acting summarily. The contempts in *Sacher* also involved disrespect for the court. Nor did *Offutt* v. *United States*, 348 U.S. 11, modify the rule of the *Sacher* case, as petitioner suggests (Br. 34). Indeed, *Offutt* cites *Sacher* with approval (348 U.S. at 13). *Offutt* held only that, where the judge has become so "personally embroiled" (348 U.S. at 17) with the individual whose conduct is in question that he is unable to approach the task of vindicating the court's authority with proper judicial detachment, he should step aside and request the chief judge of the court to assign another judge to hear the matter. The present case involved no such personal embroilment on the part of Judge Miner, and is therefore wholly unlike *Offutt* in this regard (cf. 348 U.S. at 16–17). In fact, nothing like the strong words which marked many of the utterances of the presid-

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complaint was pertinent to the issue of public economic injury. But the judge's expression of confidence in counsel's good faith on this point was in no way related to petitioner's conduct in threatening to ignore the judge's order referred to in Specification 6. There is no question but that Judge Miner considered that conduct abusive and insulting when it occurred and at all times thereafter.

It should be noted that Judge Miner's statement, "Oh, no, I never dreamed of anything like that—", made in reply to petitioner's statement, "If your Honor tells me I can't do something, I am not going to get in contempt of court just to be funny about it" (2 R. 591) (quoted at Pet. Br. 34–35), was made before the incident involved in Specification 6.

ing judge in the *Sacher* case (see appendix to the opinion of Mr. Justice Frankfurter, 343 U.S. at 42–89) occurred in the present case. Judge Miner demeaned himself throughout the trying days of a vigorously and sometimes bitterly contested lawsuit with exemplary dignity and forbearance. The reluctance with which he felt compelled to issue the contempt citations is reflected by his statements at the time that he had "no ill feeling in the matter" (4 R. 1721) and "no malice in my heart" (4 R. 1722; see 5 R. 36), but that he could not "permit this to go unchallenged" because "[*t*]*he court* was seriously hurt in this matter" and "*the court* has got to protect itself * * *" (emphasis added) (4 R. 1721, 1722, 1723). (See the Statement, *supra*, pp. 21–25.)

Furthermore, the fact that Judge Miner stated that he would vacate the contempt order if petitioner and Mr. Freeman would file a "petition of retraction and apology" (4 R. 1722; see the Statement, *supra*, pp. 22–23, 24–25) does not indicate that, as petitioner argues (Br. 36–37), the judge "regarded the whole contempt proceeding as personal to him" (Br. 36). The willingness of the judge to vacate the order on this condition was consistent with his repeatedly expressed view that it was the impairment of the authority of the office which he occupied which he was seeking to vindicate—not any offense to himself as a person. Nor was it improper, as petitioner suggests (Br. 37), for Judge Miner to offer to vacate the order of contempt if an apology and retraction were made. A trial court has wide latitude with respect to the vacation of its own orders. Judge Miner's willingness to take

such action in this case if an apology and retraction were forthcoming merely emphasizes the complete lack of vindictiveness with which he undertook to vindicate the authority of the court.

For these reasons, the court of appeals was correct in concluding that Judge Miner was not "personally involved in controversy with [petitioner]" and that "the records before us affirmatively rebut any personal enmity harbored by the judge against the two respondents before him" (5 R. 67). By the same token, the court of appeals properly concluded that the rule of the *Offutt* case did not require that there should be "a remandment for retrial before another judge" (5 R. 67). (See the Statement, *supra*, pp. 26–27.)

2. If the fact that the language charged as contemptuous involved disrespect for the court sufficed without more to disqualify the court from dealing with the matter summarily, as petitioner urges, it is evident that one of the principal purposes of the power of summary contempt would be defeated. The proper maintenance of the dignity and authority of the court in the eyes of the jurors, parties, attorneys, and public requires in all ordinary cases that the same judge against whom the disrespect is directed pronounce the judgment of contempt and assess the penalty. Respect for the authority of the court would not be enhanced if the general rule were that manifestations of disrespect could be punished only by the presiding judge's assuming the role of complaining witness before another judge in a proceeding under Rule 42(b). The very cumbersomeness of such a procedure argues weightily against the adoption of

any such general practice. In all ordinary cases, the judge against whom the disrespect was directed would be but one of several, possibly many, witnesses—jurors, parties, court attendants, members of the public—anyone who happened to witness the conduct or hear the utterance charged as offensive. Rather than resort to any such procedure, many a judge would, in all but the most aggravated cases, let the matter pass without initiating appropriate vindicatory action—to the detriment of the orderly conduct of trials and the judicial process.

The alternative to such a procedure is that sanctioned in the *Sacher* case and followed here—permitting the presiding judge himself to exercise the "penal vindication of the dignity of the court" (*Cooke* v. *United States*, 267 U.S. 517, 536), subject to the safeguards afforded by appellate review, and, in those special situations in which the judge has become so emotionally involved as to be unable to act with proper judicial dispassion, subject to the special rule of the *Offutt* case. As this Court observed in *Fisher* v. *Pace*, 336 U.S. 155, 161, a case which also involved disrespect for the presiding judge:

> In a case of this type the transcript of the record cannot convey to us the complete picture of the courtroom scene. It does not depict such elements of misbehavior as expression, manner of speaking, bearing, and attitude of the petitioner. Reliance must be placed upon the fairness and objectivity of the presiding judge. The occurrence must be viewed as a unit in order to appraise properly the misconduct, and the relationship of the petitioner

as an officer of the court must not be lost sight of.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court of appeals should be affirmed.

ARCHIBALD COX,
Solicitor General.
HERBERT J. MILLER, JR.,
Assistant Attorney General.
PHILIP R. MONAHAN,
Attorney.

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